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Abstract

Law schools, teaching primarily by the casebook method, generally avoid the thorny issues that real clients pose.' Recently, however, law review articles and the ""regular classroom"" have referred more frequently to real client stories. Law school clinics are a primary source of client stories. Despite increased attention to clinical programs, client interests are frequently subordinated to the goals of students, clinical law teachers and law schools. This article urges clinicians to constantly evaluate whether and how well they and their students take their clients' interests and perspectives on clinical education into account. It argues that clinic teachers must learn to tolerate and maximize the tension that exists between their duty to their students' education and the production of scholarship and their duty to their clients' goals. Part I provides a brief view of clinical teaching methods, the tension between student education and client service, and the impact of the law school setting on clinic work. Part II acknowledges client interests that are well served by law school clinics. Part III discusses client interests which tend to compete with student and school interests. Part IV outlines concrete suggestions for balancing client and student interests and offers supervisory and institutional practices that can help to keep clients' interests where they should be: first among equals. This article concludes that the struggles with client interests in the clinical setting should inform the rest of the legal curriculum.

Keywords

Law school, law clinics, legal curriculum, legal studies, legal teaching, client interests, teaching methods, legal instruction

Disciplines

Legal Education

TEACH YOUR STUDENTS WELL: VALUING CLIENTS IN THE LAW SCHOOL CLINIC

Ann Juergens[†]

INTRODUCTION

Law schools, teaching primarily by the casebook method, generally avoid the thorny issues that real clients pose.¹ Recently, however, law review articles and the "regular classroom" have referred more frequently to real client stories. Their chaotic interplay of persons, communities, institutions, legal doctrine, economics and psychology make excellent teaching vehicles that even the most sophisticated simulations cannot replicate. On the whole, the increasing use of real people's stories to study law and the legal system is a wise move in legal education.

Law school clinics are a primary source of client stories. Clients and their concerns receive more attention in clinical programs than in the rest of the law school curriculum. Historically, clinics have been effective at teaching students advocacy, lawyering skills and ethics.² Though scholars have begun to recognize clinics as rich sources of practical data,³ clinics re-

[†] Associate Professor, William Mitchell College of Law. A.B. Harvard University, 1973; J.D. University of Minnesota, 1976.

¹ For a learned discussion of how the law school method of studying appellate decisions obscures the needs of the people who use the legal system, see JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976), especially *Passengers of Palsgraf* at 111. "I became increasingly aware of the neglect of the person by legal casebooks, legal histories, and treatises of jurisprudence. . . . Neglect of persons, it appeared, had led to the worst sins for which American lawyers were accountable." *Id.* at vii.

² Clinical programs are very diverse. Some schools use the term "clinic" simply to refer to programs that teach methods of lawyering as well as the doctrines of lawyering, with or without clients. This article focuses on the archetypical clinic — a teaching law office within a law school that serves real clients using student lawyers. See Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 720 n.12 (1992); see also Marjorie McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239 (1990) (further descriptions and data on the varying conditions of live-client clinics in United States law schools).

³ See Conference, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717-1257 (1992); Bernard Freamon, A

main a largely untapped source of information for understanding practice, for testing social justice strategies, and for uncovering the structures of the law. But even as clinical scholarship develops, and as clinical programs and their teachers gain increasing acceptance in legal education,⁴ two problems remain. First, the client, viewed in part as a vehicle of learning, is often taken for granted.⁵ Second, many law school faculties continue to marginalize their clinical counterparts.⁶

Despite increased attention to clinical programs, client interests are frequently subordinated to the goals of students, clinical law teachers and law schools. The continued absence of debate concerning the cost, small or large, to the *client* of being a subject of legal study reveals and perpetuates this subordination.⁷ In much clinical literature, how much the client knows

Blueprint for a Center for Social Justice, 22 SETON HALL L. REV. 1225 (1992); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (discussing poverty law practice, not just in clinical context); ASS'N AM. L. SCHOOLS SEC. ON CLINICAL LEGAL EDUC., FINAL REPORT OF THE COMMITTEE ON THE FUTURE OF THE IN-HOUSE CLINIC (1991) [hereinafter IN-HOUSE CLINICS]. Earlier studies of clinical curricula also noted the potential of clinic practice to enrich the rest of the law school curriculum. See ASS'N AM. L. SCHOOLS-A.B.A. COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUC., GUIDELINES FOR CLINICAL LEGAL EDUCATION 23 (1980) [hereinafter GUIDELINES] ("The client clinic . . . is a source of legal problems for faculty and student research.").

⁴ The number of clinical programs in United States law schools has increased significantly over the past decade. See McDiarmid, *supra* note 2, at 241-42 (summary analysis of 1987 AALS clinical program survey results); see also ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS § 405(e) (1988) [hereinafter A.B.A. STANDARDS]. The ABA passed standard 405(e) in 1984 in an attempt to mandate that law schools treat clinical teachers "reasonably similar" to other faculty. The data and rules reveal that clinics are increasing in numbers and in acceptance, but as this article discusses, clinics and clinicians are still not well understood.

⁵ Richard Boswell, *Keeping Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187, 1191 (1992) (arguing that clinicians are leaving practice behind as they try to impress schools with their academic integrity).

⁶ See McDiarmid, *supra* note 2, at 245; see also A.B.A. STANDARDS, *supra* note 4.

⁷ Several writers have discussed a related but distinct issue: the cost to the client of the inherent tendency of the conventional practice of law to dominate a client who is not a large business. They argue that material gain

about the use of the client's "case" in teaching is difficult to discern. Supervisors have sometimes spent virtually no time with the client before conducting a trial that will determine whether the client goes to jail or loses a home, a child or income.⁸ Legal educators are beginning to think and learn about the client's experience with the legal system, but know surprisingly little about the client's experience with clinic teaching and the students' learning process.⁹

The tendency of law faculties to marginalize their clinical faculty also subordinates client interests. Client-less faculty members exert spoken and unspoken pressures on clinicians to push clients into the background — let students learn from them perhaps, but shunt the clients to the margins to prevent them from keeping the clinicians from other work. This article urges clinicians to constantly evaluate whether and how well they and their students take their clients' interests and perspectives on clinical education into account. It argues that clinic teachers must learn to tolerate and maximize the tension that exists between their duty to their students' education and the production of scholarship and their duty to their clients' goals.

from the legal process may come at the expense of the client's sense of control of the client's life, self-esteem and power. Gerald Lopez' term "rebellious lawyering" describes the evolving alternative, which seeks to mitigate the costs of lawyering to the client and the client's community. See Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1609 (1989). Paul Tremblay points out that to change some of the drawbacks of conventional lawyering, lawyers may need to balance some individual clients' short-term material interests with the longer-term community interest in preventive care, just as medicine is learning to cut back on service to those in crisis in favor of preventive medicine. Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 952, 954-68 (1992). The legal establishment would benefit from an analogous debate, which is unfortunately beyond the scope of this article.

⁸ See, e.g., Robert Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 972-81 (1992) (describing a case that went awry at trial where apparently the clinical teacher, who had thoroughly supervised the work of his students during a month of preparation for trial, did not meet the client until the day of or the day before trial).

⁹ As our law schools are structured today, most of a clinician's time to study practice is taken from the clinician's direct work with clients. To write this article, I have refused case after case for the summer, including appeals of cases that I handled with students in earlier proceedings. My colleagues at other schools have long ceased attending initial client interviews.

Part I provides a brief view of clinical teaching methods, the tension between student education and client service, and the impact of the law school setting on clinic work. Part II acknowledges client interests that are well served by law school clinics. Part III discusses client interests which tend to compete with student and school interests. Part IV outlines concrete suggestions for balancing client and student interests and offers supervisory and institutional practices that can help to keep clients' interests where they should be: first among equals. This article concludes that the struggles with client interests in the clinical setting should inform the rest of the legal curriculum. Legal educators should consider the following questions: What messages are law teachers sending students about the importance of listening to good lawyering? Do schools teach the ability to develop factual context as an essential element of the skill of legal analysis? To what extent are client perceptions and values used in the development of the legal theories of the client's cases? And how much caring does excellent advocacy ask of each of us?

I. THE NATURE OF CLINICAL PROGRAMS

A. TEACHING METHODS

The classical model of teaching in clinics stresses development of lawyering skills, ethical judgment and values, and adjustment to the professional role.¹⁰ Some clinics also focus on teaching "substantive" law. A recently revived paradigm of clinical education includes the study of the legal system and ways to increase justice in the system.¹¹ Clinical programs

¹⁰ See Norman Redlich, *The Moral Value of Clinical Legal Education: A Reply*, 33 J. LEGAL EDUC. 613, 614-15 (1983); Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENTS 374, 375-86 (1973); Eric Janus, *Clinics and 'Contextual Integration': Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 463-66 (1990); Minna Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 184 (1989).

¹¹ See Bellow, *supra* note 10, at 378 (describing how clinics afford "experience and knowledge of the legal system in operation, and its capacity to erode or at least foster examination of the rigid distinction between theory and practice, fact and value, the subjective and objective, which underlies the dysfunctions of modern social life"); Elliott S. Milstein, *Consultants' Reports — The Design of American University Criminal Justice Clinic*, in GUIDELINES,

augment this paradigm with ideas about the importance of context and narrative to lawyering¹² and the role of feminist and outsiders' voices in understanding the law.¹³

Clinics employ numerous methods to accomplish their varied goals.¹⁴ Allowing the student to take responsibility for a client's case achieves most goals in clinical teaching. A student learns how to exercise judgment as an attorney by experiencing the *consequences* of personal judgments. Having the primary decision-making role in a client's case allows the student to become the leader in the student's own legal education. The student's experience clarifies individual values and develops legal and ethical judgment.¹⁵

supra note 3, at 243 (discussing clinical opportunities for "institutional analysis . . . of the reality of the legal system."). For more recent discussions of the subject, see articles listed *supra* note 3; see also Lopez, *supra* note 7, at 1603, and Tremblay, *supra* note 7, at 954-968.

¹² See Naomi Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1, 15 (1991); Alfieri, *supra* note 3, at 2114-17; Goldfarb, *supra*, note 3, at 741. On the uses of narrative from literature in clinical work, see Marie Ashe, *The 'Bad Mother' in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1032-37 (1992); Beverly Balos, *Learning to Teach Gender, Race, Class, and Heterosexism: Challenge in the Classroom and Clinic*, 3 HASTINGS WOMEN'S L.J. 161, 172 (1992).

¹³ For a feminist approach to clinical practice and teaching, see generally Goldfarb, *supra* note 3. For discussions of the benefits and challenges of allowing clients (outsiders) to speak to the legal system, see Clark Cunningham, *A Tale of Two Clients: Thinking about Law as Language*, 87 MICH. L. REV. 2459 (1989); Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); White, *supra* note 3; Alfieri, *supra* note 3, at 2129-45; Dinerstein, *supra* note 8, at 985-87.

¹⁴ The most common methods in live-client clinic teaching includes student observation, simulation or discussion of lawyers' roles, student responsibility for live-client cases, individual discussion between student and professor ("supervision"), and classroom instruction. GUIDELINES, *supra* note 3, at 20-21. These instructional components may also be formulated as practice, performance, reflection and self-evaluation. See also Peter Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277 (1982) (discussing the importance of designing clinic course structure and choosing among methods); Kenneth Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

¹⁵ See Redlich, *supra* note 10, at 613; William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that development of individual ethical judgment is vital to good lawyering); Goldfarb, *supra* note 3, at 1696.

Allowing a student to direct a case requires a great deal of self-control by the clinical teacher, who must surrender authority as both a teacher and a lawyer. A clinical teacher must withhold personal judgment to allow students to learn more than merely how to carry out orders or analyze problems in the same way as the teacher.¹⁶ Giving students greater freedom to make their own decisions permits them to develop creativity and problem-solving abilities. Students take on the role of the lawyer and feel its effects on themselves and on others — the client, courts, community, family and society.

The clinical teacher feels a constant tension arise between duty to students and duty to clients. On the one hand, the teacher must yield control of the client's case so that the student may learn. On the other hand, the teacher must remain close enough to the case to protect the client's interests. Guiding student reflection after lawyering performances also requires restraint by the teacher because the student's self-evaluation skills are also developing during this process.

While most clinicians handle this tension ably, the clinician must acknowledge it lest it be suppressed in the interests of efficiency. It is far simpler to either turn cases over entirely to students and relax oversight, or take charge of the cases and give students teacher-defined ministerial tasks as if the students were law clerks instead of responsible lawyers on the case.

Furthermore, clinic teachers must maintain the tension between education and client service because its very existence teaches tolerance of this parallel tension in the students' relationships with their clients. The tension between student education and client service mirrors the tension between client goals and attorney goals that is a reality in lawyers' work. Attorneys define themselves and earn their living representing clients. Situations are not uncommon where the client's wishes — to pursue the principle of a dispute, or to change the adverse party's behavior, rather than to settle the dispute for money or other terms the attorney thinks reasonable — may conflict with the attorney's goals of maintaining morals and/or income. An excellent attorney will address, not avoid, the conflict between the client's goals and personal ethical and material well-being.

¹⁶ See Robert Condlin, *Tastes Great, Less Filling: The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986) (arguing that clinical programs merely persuade their students to think and act like their supervisors).

Thus, by promoting the competing goals of both education and client service, clinic teachers will instill in their students an appreciation for the competing goals of their relationships with clients. By evoking that tension rather than banishing it, clinicians teach students to embrace and take joy in the multiple layers of human goals that are inherent in lawyers' work.

B. THE IMPACT OF THE LAW SCHOOL SETTING ON CLINICS

Any discussion of the effects of clinical teaching on clients must include the context of clinical programs.¹⁷ Clinical programs are actors within the local community, but are also creatures of their law schools, affected by law school values.¹⁸ Clinical teachers are *paid* by law schools to teach; perhaps inevitably their employers rank teaching and scholarly research and writing above the clinical teachers' obligation toward clients.¹⁹

The integration of clinical programs into law schools is not without its benefits: the advancement of students' legal education, the encouragement of reflection and research, the availability of thoughtful colleagues, the insulation of work from marketplace pressures, and the devotion of resources to the clinical project. Unfortunately, most law schools have also historically devalued legal practice.²⁰ Faculties and administrators often

¹⁷ Clients' contexts also influence client cases and should be discovered. See Alfieri, *supra* note 3, at 2117.

¹⁸ This is especially true of clinics physically located within the body of the law school. Law school influence is adumbrated when there is physical distance between it and the law school clinic. Some law school clinics are located entirely at legal services or public interest law firm offices and law students travel to the off-campus office to perform many or most of their duties. Other clinics have their own buildings or offices apart from the rest of the law school, and even when they are staffed entirely with law school employees, the law school culture cannot have the same influence as when the physical space of the law school surrounds the clinic offices. The discussion here focuses on in-house clinics.

¹⁹ That this may be inevitable has not allowed it to escape criticism. See John Elson, *The Case Against Legal Scholarship: If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989) (a clinician's argument that law schools emphasize scholarship at the expense of education for professional competence).

²⁰ See Jerome Frank, *Why Not a Clinical Lawyer-School?* 81 U. PA. L. REV. 907, 908 (1933), quoting Langdell's statement:

underestimate the importance of the interaction of clinical faculty with clients. An unspoken preference for "scholarship" over practice, in part, perpetuates this devaluation.²¹ Law professors commonly do not have frequent working contact with practicing attorneys; many begin teaching with relatively little experience representing clients.²² Nor do law schools have the institutional equivalent of the teaching hospital, where teaching medical professionals and practice-oriented medical professionals interact on an ongoing daily basis.²³

In addition, some scholars argue that the primary method of law study, the casebook method, fails to reveal the impor-

"What qualifies a person to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes — not experience, in short, in using law, but experience in learning law . . ."

See also Herma Hill Kay, *Lawyers and Law Teachers: Are We In the Same Profession?*, AALS NEWSL., Dec. 1989, at 1; E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695 (1977) (discussing how many professors view practicing lawyers with disdain).

²¹ See, e.g., Stephen Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990's*, 75 MINN. L. REV. 619, 629-30 (1991); Marjorie Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55 (1991); Pamela Feinsilber, *Publish or Perish*, 11 CALIFORNIA LAW. 114 (1991).

²² An empirical study of all law professors listed in THE AALS DIRECTORY OF LAW TEACHERS 1988-89 found that although more professors hired recently have had some exposure to practice than in years past, the extent of that experience is meager. Only one-quarter of all professors had more than five years of practice experience. Significantly, "lower ranked" schools seem to value practical experience more highly: the percentage of professors with practice experience decreases as the rank of the professor's school of employment increases. Thus, the percentage of professors with any practice experience decreased from 79% to 63% at the "top ranked" schools. See Robert Borthwick & Jordan Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191, 194, 218, 219, 221 (1991).

²³ Medical education literature takes for granted the existence of supervised live patient studies for medical students. The historic apprenticeship model in physician education was supplemented over the years with classroom academic study, but was never supplanted by anything analogous to the casebook method of doctrinal study as happened in legal education. See, e.g., Ken Cox, *What Are the Roles of a Surgical Mentor?*, 152 AUSTL. N.Z. J. SURG. 259 (1988); J.H.McL. Dawson, *Training in Surgery*, 60 AUSTL. N.Z. J. SURG. 657 (1990); Reuben et al., *The Residency-Practice Training Mismatch: A Primary Care Education Dilemma*, 148 ARCH. INTERN. MED. 914 (1988).

tance of clients, their contexts and perspectives.²⁴ In appellate decisions the people who bring the cases are reduced by design to the facts needed to enunciate the legal rule of the case. Thus, motivation, needs, age, race, occupation, wealth or poverty, and other such characteristics are usually eliminated in the appellate judges' written reasons for decision. Although that may be the wisest way to develop law of universal applicability, it tends to convey the idea that the particular human beings who brought the litigation, and their personal and social contexts, are details to which a lawyer need *not* pay close attention.

Law schools generally forget that client interests are — or should be — primary concerns for a clinical teacher. The result is pressure on clinical teachers to attend less to the clients' needs and more to the students' interests and institutional demands. Focusing on teaching and the study of the legal system is important to the development and maintenance of strong clinical programs. But the time has come to heighten interest in clients and the just resolution of their legal problems.

II. CLIENT INTERESTS SERVED BY LAW SCHOOL CLINICS

Many client interests, such as dedication to representation, are well served by student lawyers. Clinical courses are almost always elective; the students who participate are usually happy to be doing "real" work and do so with vigor. Many clients are happy to participate in the educational process. Others are gratified to have relationships with both a supervisor and a student attorney, viewing two lawyers as evidence of the significance of their cause.

Furthermore, clinical settings can serve the client's interests better than settings in which inexperienced lawyers practice without supervision. Most private law firms do not provide comparable training and supervision of their new practitioners.²⁵

²⁴See, e.g., Frank, *supra* note 20, at 910-913 ("[T]he opinions of upper courts conceal or fail to disclose many of the most important factors which lead to decisions."); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 1-3, 130 (1990) ("[T]he basic method of legal analysis requires simplifying the problem to focus on a few traits rather than the full complexity of the situation . . ."); Goldfarb, *supra* note 3, at 732.

²⁵ Two out of three lawyers nationwide practice solo or in firms of under

Foremost, student lawyers provide the client with legal assistance.²⁶ Without student lawyers, most clinic clients would have no legal representation.²⁷ Nevertheless, that many

five lawyers. A.B.A. TASK FORCE ON LAW SCHOOL AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES, 382, 387 (1992) [hereinafter MACCRATE COMMISSION REPORT]. The reality is that most small firms cannot afford extensive training and supervision of their new members. Reports vary on the training practices of large firms. See Elson, *supra* note 19, at 353. What is certain about large firm practice is that clients are increasingly less willing to absorb the costs of training novice lawyers. See, e.g., Steven Brill, *No More Status Quo*, AM. LAW., June 1992, at 20 (describing the changing practices of in-house counsel when hiring outside counsel). Two forces against supervision of novices in private practice are the pressures of the market, which tend to discourage doubling up on simple cases, and law firm cultures, which value autonomy and competence, even when competence is an illusion. See Elson, *supra* note 19, at 353-54 n.32; Sallyanne Payton, *Is Thinking Like a Lawyer Enough?*, 18 U. MICH. J.L. REF. 233, 234 (1985).

²⁶ Indeed, the idea that even unsupervised students would be better for indigent clients than no lawyer at all generated in part the original idea of student practice. About the time that states began to pass student practice rules allowing student representation of clients, indigent criminal defendants had just won the right to counsel at government expense. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). The subsequent need for counsel for the indigent was so great that it overshadowed concern over using the poor as training aids or about the competence of law students to represent clients with little supervision. See, e.g., *Hackin v. Arizona*, 389 U.S. 143 (1967) (Douglas, J., dissenting) (arguing that lay persons as well as law students should be allowed to assist indigent people with their legal matters, so long as it was done for free).

In 30 jurisdictions, student practice is allowed only on behalf of the indigent. In 38 jurisdictions, student attorneys need not adhere to the Rules of Professional Conduct and in 25 jurisdictions, student attorneys may litigate a civil suit without a supervising attorney being present. See Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Wyoming and the District of Columbia (allowing student practice in (most) civil courts without the presence of a supervising attorney).

²⁷ Extraordinarily large numbers of people are unable to get the most elementary legal needs met. See, e.g., Benjamin Cardin & Robert Rhudy, *Expanding Pro Bono Legal Assistance in Civil Cases to Maryland's Poor*, 49 MD. L. REV. 1 (1990) (describing 1987 Maryland study finding that 80% of the critical civil legal needs of the poor were not being met); *Legal Aid Offices Report High Demand, Low Funding*, STARTRIB.: NEWSPAPER TWIN CITIES, Oct. 14, 1991 at 1B (describing similar situation in Minnesota). Most clinics serve sectors of the population, such as the indigent, that are only barely being

clients have few alternatives²⁸ may not justify every compromise they are asked to make in the course of receiving student representation.²⁹ To measure a clinic's worth to clients simply in contrast to what might happen had they no lawyer at all promotes carelessness.

III. CLIENT INTERESTS THAT COMPETE WITH STUDENT AND LAW SCHOOL INTERESTS

The first step toward reconciling the interests of law students and of law schools,³⁰ and the interests of clinic clients, is to examine the extent to which these interests compete. What

served by the practicing bar. See McDiarmid, *supra* note 2, at 245 (outlining general characteristics of clinic client groups). In fact, the majority of the rules that authorize student practice (i.e. 30 out of a total of 50 sets of rules, including those of the District of Columbia and Puerto Rico) allow student attorneys to practice only for indigent clients or for the state. See Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and the District of Columbia.

²⁸ See George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415, 432 n.54 (1990/91) (brief listing of the alternatives that do exist for indigent clients, such as public defenders, legal aid, or the private bar, where statutory attorney fees may be recoverable or pro bono representation secured).

²⁹ One cannot assume that a person with "legal" trouble automatically will do better with a lawyer than without. At least one study of the criminal courts found that defendants who represented themselves in misdemeanor cases fared better than did those represented by publicly appointed lawyers. See Stephen Bing & S. Stephen Rosenfeld, *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston*, in JOHN ROBERTSON, *ROUGH JUSTICE: PERSPECTIVE ON LOWER CRIMINAL COURTS* 264-271 (1974). In administrative hearings, I have seen bad lawyering in opposing counsel that has left me certain that the litigant would have done better on her own, since the administrative judge could have watched out for her interests better than her own lawyer, and would have, but for the bad lawyer.

³⁰ Law schools are not the only employers of clinical teachers. Some law school clinics are almost wholly funded through grants or by the state public defender's office or the legislature (as in the example of Legal Assistance to Minnesota Prisoners at both William Mitchell College of Law and the University of Minnesota). In these circumstances, the law school may give an office and other in-kind services to the clinical program and still not be the true employer. As the employer's interests vary, the interests that may compete with the clients' interests also vary.

follows is a brief examination of the client interests that compete with the instructional mission of law school clinics.

A. THE CLIENT'S INTEREST IN HAVING THE LEAST NUMBER OF "MISTAKES" MADE IN THE COURSE OF REPRESENTATION

Student attorneys learn by doing and by having a stake in the outcomes of choices.³¹ A responsive teacher knows that students bring great creativity and vitality to clinic practice, which would be lost if the supervisor's way of doing things routinely overruled students' ideas and judgments. On the other hand, the clinic supervisor must ensure that students practice without injuring a client's cause. A serious error by a student jeopardizes both the client's case and the supervisor's license.³²

Students often learn most effectively by making their own mistakes. Evidence obtained through personal experience is far more persuasive to a novice than that presented by even the most experienced teacher. At each stage in a case, clinic teachers must decide whether the overall cost to the client of potential student mistakes outweighs the value to the student of the knowledge gained.

While students may make many mistakes, they tend to make them in one of two areas: in the performance of a skill or in the exercise of judgment.³³ Errors in the performance of skills occur during the course of interviewing, counseling, negotiation, legal writing, the use of exhibits, and the conduct-

³¹ See *supra* part I.A.

³² See, e.g., MINN. R.S.Ct. 2.04 (under which the supervising attorney must assume personal professional responsibility for her students' work). This is typical of student practice rules, which rarely require student allegiance to the Rules of Professional Conduct. Most Boards of Lawyer Professional Responsibility, therefore, do not have jurisdiction over student misfeasance. Rather, responsibility for the client representation remains with the supervisor. This leaves intact the mandate of MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1993):

(c) A lawyer [having direct supervisory authority over a nonlawyer such as a student] shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or . . . ratifies the conduct involved; or (2) the lawyer . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

³³ I thank my colleague, Peter Knapp, for this insight.

ing of depositions and direct and cross examinations. Mistakes of judgment occur while performing a skill or developing an overall strategy. Examples include errors in discovering the client's foremost goals, in choosing the strongest theory of the case given a particular client and factual context, and in deciding which witnesses to interview and to call to testify. Mistakes in performance of skills or of judgment can alter the outcome of a client's case.

Performance errors are easier to prevent and correct than judgment errors. Many law schools offer simulation-based courses, such as trial advocacy, which initiate the development of performance skills before the student uses the skills to actually represent a client in a clinic. In addition, once in the clinical setting, careful preparation and practice prevent most serious mistakes in performance.

Furthermore, serious performance errors are usually easy to detect and rectify before too much damage is done. Failing in a simple negotiation, fumbling during a deposition, and asking one too many questions during cross-examination, are mistakes readily apparent to teachers, students, and even clients. Students can correct some performance errors with follow-up, such as a second interview with a witness. A teacher can mitigate others with on-the-spot intervention in the student's performance.³⁴ This is only possible, of course, if the teacher is *present* at the student performance. For example, a teacher can ask further questions at a poorly conducted deposition, intervene in a negotiation when a student is floundering, or make a closing argument for the student who feels suddenly overwhelmed. Supervisors and students still cannot prevent or correct every error committed by the inexperienced student.

1. *Performance Errors*

The following section of this article describes three kinds of performance errors that occur during client interviews. This catalogue is not exhaustive; rather, it is intended to suggest the scope of possible error and harm to client interests. Under current norms of clinic practice, the errors most likely to remain undetected occur during interviewing because very few clinical teachers attend initial interviews with students and clients.

³⁴ See discussion of intervention in student performance *infra* part IV.E. and accompanying footnotes.

Legal educators seem to believe that an error or omission a student may make in an interview can be fixed later.³⁵

Admittedly, students and teachers may uncover some flaws in initial interviews during supervisory meetings, of which some will be correctable. Other common interviewing errors, however, remain invisible or may not be remedied even if they become apparent.

First, students may fail to ask open-ended questions in client interviews. Learning to ask open-ended questions is essential to effective interviewing, and most clinic programs have training or prerequisite courses designed to drill the student in asking open-ended questions to gather information. Still, many students who master this skill in a controlled situation lapse into asking leading questions when faced with the chaos and stress of a client interview.

The student may misunderstand basic facts if the student has asked a client leading questions in an early interview. For example, one of my students listened to a client's tale of how he was fired from his job after a series of run-ins with an abusive boss. In an attempt to show concern and empathy for the client, the student repeatedly filled in details of his story with statements, such as "and that's when the boss yelled at you again?" In the intense moment of each question, the student was oblivious to the fact that she was leading the client. Clients have many good reasons for nodding "yes" to leading questions from their attorneys,³⁶ and in this case the client did just that. At the end of the interview, the student had a picture of events that was close to reality, but the client's assent to leading questions had seriously altered the details of the client's communications with his boss. Those details, if undiscovered before

³⁵ See GUIDELINES, *supra* note 3, at 27 (setting guideline that the supervisor should "accompany the student in all proceedings where the effects of the actions which may be taken can be irreversible, and be prepared to take over for the student if the client's interests require"). Most clinical practice recognizes that trial is one of those "proceedings" in which irreversible error can occur, yet it remains structured as if irreversible error cannot occur at interviews and during investigation.

³⁶ The client may have ceded power in the relationship to the attorney, may not want to shame the attorney with correction of the mistake (i.e. the client is being polite), may be ashamed of the correct answer (as in the example in the text, in which the client had yelled at his boss), may think that "yes" is what she is "supposed to say" (as in the common case of a woman who feels she should want custody of her children in a divorce case, even if she is unsure), or may think something was misunderstood earlier in the interview.

the unemployment hearing, could have lost the otherwise meritorious case.

Unconscious student use of leading questions can also skew the client's choice of goals within the legal system. In another instance, a supervisor discovered from spot reviews of videotapes that students in a family law clinic tended to ask divorcing women the question: "And you want custody of your children, right?"³⁷ Again, the clinic clients agreed with their student-attorney questioners, regardless of their own desire for custody. The result may have been petitions for custody filed and pressed — lives changed — because of student interviewing errors. Since these errors were discovered, the clients' true goals with regard to custody of their children could be re-examined. Unfortunately, the form of the question may send a client the message that she *should* want custody. Once this message is received, uncovering a client's potential ambivalence about custody is more difficult. Finally, regardless of supervisors' and students' abilities to mitigate the mistake, this kind of error results in unnecessary stress to the clients, their children, and the adverse parties.

Second, errors in interpretation and listening may affect the student's ability to recognize all of the legal theories applicable to the client's case. Law students are immersed in learning the categories of legal doctrine during their first or second year of law school. The clinic often presents the first opportunity to use their new knowledge. Based on their doctrinal education, students may believe prematurely that they understand the legal theories that apply to their client's case.

This "pre-understanding"³⁸ can obscure a client's ideas about the case. For example, a student told her supervisor that a thorough review of a potential breach of contract case had convinced her that the client, Ms. D., had no claim.³⁹ The

³⁷ This example comes from a colleague, Suellyn Scarnecchia, at the University of Michigan.

³⁸ Pre-understanding is a useful term that I take from Anthony Alfieri, who uses it in a discussion of the practice of poverty lawyers and credits the term to Paul Ricoeur. The pre-understandings that law students bring to their meetings with clients are similar to those that poverty lawyers bring to interpreting their clients' stories, except that students focus more on their doctrinal knowledge, and have a fantasy of what the relationship with the client is supposed to look like. See Alfieri, *supra* note 3, at 2123 n.57.

³⁹ This example is from my own supervisory experience in the William Mitchell Business Law Clinic. I received the client's permission to recount it

student had interviewed Ms. D. and studied the cancellation clause in the contract. The student researched the law and checked with a contracts professor to confirm that the adverse party's letter of cancellation followed the simple requirements of the cancellation clause. The student was certain that her task as a lawyer was to tell Ms. D. that she had no remedy for the cancellation of this contract, and to counsel her on how to prevent such situations in the future.

At the follow-up interview, the student counselled Ms. D. as to her lack of recourse and began a discussion of how to protect herself in future contracts for services. Ms. D. did not understand: she was politely adamant that she had been treated unfairly and could not believe that the adverse party could get away with suddenly canceling their contract. The student's supervisor, who was present at this interview, intervened and probed further into the client's frustration. Eventually, Ms. D.'s perspective on the meaning of the cancellation clause was uncovered.⁴⁰ The revised case theory focused on the interpretation of the thirty-day notice requirement within the cancellation clause. Ms. D. filed and won a breach of contract action in Conciliation Court with a carefully researched argument. Ms. D.'s untutored version of the meaning of her contract was the key to her success. The clinic student's difficulty in suspending her understanding of the contract effectively prohibited an analysis based on Ms. D.'s understanding.⁴¹

Many student and novice lawyers find difficulty in withholding judgment while they assess how the law intersects with a client's situation. Legal training emphasizes the ability to *assign* legal categories to fact patterns, not to *suspend* those categories. Nevertheless, client-generated approaches, when translated into legal theories, are more likely to convince judges and juries of the validity of the client's claim. Clients are also

here with slightly altered details to protect her anonymity.

⁴⁰ Without going into detail, that meaning was that a 30-day notice was written into the clause in order to allow each party time to avoid damages resulting from cancellation. The adverse party's notice purported to be a 30-day notice, but had not been timed so as to allow Ms. D. to avoid damages; the notice came too close to the deadline for her next performance — designing graphics — under the contract. Ms. D. had turned down other graphics jobs in order to stay free to perform as agreed.

⁴¹ The facts that Ms. D.'s first language was not English and that she was a welfare recipient contributed to the student assuming that she might understand the cancellation clause better than the client did.

generally more satisfied with an approach that incorporates the client's vision of the case.

Third, students may avoid seemingly peripheral or difficult areas of questioning that may be important to the client or the client's case. A real potential for client harm exists when students dodge underlying issues in spite of client hints. For example, a student conducted a very competent interview with a client concerning whether her workers in a house cleaning business were employees or independent contractors.⁴² About halfway through the interview the client mentioned that she had not filed income taxes for several years. Her comment sounded off-handed and unconcerned. The student did not question the client further about her tax situation.

In a meeting about the case a day later, for which he was well-prepared and thoughtful, the student outlined his analysis of the issues and his plans for the case. He was surprised when I asked whether we needed to give the client any tax advice. He explained that he did not pursue the tax issue because he did not think the client wanted advice on that issue. My perception, on the other hand, was that the client had purposefully mentioned the failure to file taxes to see whether the student became concerned. I believe that the student's lack of reaction reassured her that the welfare of her business would not be affected by the tax issues. The student's failure to pay attention to this peripheral issue may have caused harm to the client.

Criminal matters, medical conditions, working conditions, community conditions, race, cultural traditions, gender, poverty, youth or age, mental illness, alcoholism, abuse, illiteracy and underlying anger or depression are among factors that can greatly affect client cases. Generally, law school courses do not focus on these factors and students may not see them as relevant. Even when students do see the relevance of such factors, their lack of training and experience in approaching these issues causes many students to omit them from their questioning. Many clients' understandable reluctance to discuss painful matters beyond their most immediate dilemma compounds the problem. Often, key facts and important goals go completely unrecognized or remain undiscovered until it is too late to use them to shape legal theories or to prevent harm. Should the student ask about the client's prosecution of her batterer in the

⁴² Again, this example comes from my own teaching and is used with the client's permission, details altered.

course of preparing to defend her eviction? Will a white student ask an African-American or Native American client whether he thinks his race has anything to do with his inability to get repairs made at his apartment? Many students would wait for the client to raise such sensitive issues, and would not inquire about it otherwise.⁴³ While a clinic class may focus on the importance of some of these issues in general or in specific kinds of cases, time never allows covering everything that comes up in real life. When unplanned difficult issues emerge, a student's lack of inquiry can hurt a client's case.

Early client interviews are crucial to identifying the interests of the client, the relevant facts of the case, and the legal theory best suited to those interests and facts. Early interviews also establish the groundwork for a healthy professional relationship between the client, the student attorney, and the law clinic. Interviewing mistakes early in the relationship may convince the client that the client's perspective is unimportant, force the client's concerns into an ill-fitting legal theory, or assist in burying a realm of important facts. If the supervisor does not attend early interviews, these mistakes are easy for the supervisor to miss until too late to remedy.

2. Judgment Errors

Student errors in assessing the client, witnesses, the opposing counsel and party, and the legal system are as difficult to discover and correct as performance errors if the supervisor is not present. One kind of judgment error starts with student discomfort with the lawyer's role. Students often divulge too much information to the other side or to third parties — such as welfare workers or witnesses — hoping to implement their aspirations for cooperation and good faith lawyering (aspirations that many teachers share). Without formal discovery requests,

⁴³ In the first example, the client was planning to drop charges so that her batterer would not defend against a burglary charge by arguing that he resided with her, an argument that her landlord, who was attending the criminal proceedings, would have promptly used as good cause to evict her. In the second example, the African-American client, represented by white law students and supervisor, did not raise race discrimination as an issue; my perception was because her experience told her we would not believe her. An inquiry into race-based differences in treatment of tenants led to charges being filed with the state Department of Human Rights and our client obtaining a very favorable settlement.

they may share information that is confidential — such as a client's medical information or living arrangements that are irrelevant for purposes of trial — without thinking twice or, more importantly, without first discussing the disclosure with the client and supervisor. These students tend to work very hard and to care about their clients, but in the process tend to overeducate the opposing side or third parties.

Despite the best efforts of supervisors, students may not give up their ethically grounded positions until the information is used against their clients. In those instances, the medical or personal information that slipped out is used against the client by a welfare worker or at trial. Some of our most thoughtful students need to experience the consequences of their actions before they understand the repercussions of their judgment.

Some students go to the other extreme, wholly absorbing the adversarial role of the lawyer. These students need to learn that cooperation with opponents is possible and often in their client's best interests. Their supervisors must teach such students the lessons of temperance before their judgments harm a client's cause.

Students also potentially err when deciding whether to use particular witnesses in case hearings. Students consult with their supervisors in deciding which witnesses to prepare. Supervisors, however, have rarely met or spoken with each witness. A student once reported to me the potential testimony of a qualified and enthusiastic witness who had observed the job performance of her client; the student assured me that the witness could be the linchpin of our case. When faced with his former employer in the hearing room, the witness clammed up, changed his story, and confused and hurt the client's case. Apparently, during the investigation stage, the student-attorney had skated quickly over the witness's version of why he was no longer with this employer. In the student's excitement at the potential of securing a strong witness, the student had avoided seeing the witness' anxiety. While in fairness one cannot say what would have happened had someone with more experience interviewed this witness, my own sense was that the witness' behavior might have been anticipated by someone with more experience in making these judgments.

Predicting whether a student has accurately measured the need for a witness against the potential for that witness to hurt the client's case is always difficult for a supervisor. Similarly, clinical teachers cannot predict the precise level of scrutiny to which each student judgment should be put, especially since

much of the student's educational benefit depends upon being allowed to make those judgments. These predictions do seem to improve with increased supervisory experience.⁴⁴

No matter how experienced their supervisor, students will inevitably make mistakes as they develop sound judgment. Having supervisors hover over each action in a case, or participate in every case-related conversation, for example, is neither practical nor educationally desirable. In sum, learning to exercise judgment competently often comes at some expense to the client. Clinical educators and their law schools must acknowledge that expense in deciding how much supervision is necessary and make efforts to minimize this cost to clients.

B. THE CLIENT'S INTEREST IN A TIMELY RESOLUTION OF HER CASE

Even when carefully planned supervision succeeds in minimizing student performance and judgment errors, student practice still diminishes other client interests. Most clients prefer a speedy resolution of their legal matter.⁴⁵ Exceptions exist, as when the client needs time to move before eviction, but even those clients want prompt attention paid to their concerns.

Almost by definition, representing a client takes longer when a student is being educated in the process. First, students need to prepare more to compensate for their lack of experience. Second, student lawyers add a layer to the legal "team" that might not ordinarily exist. Students must submit legal writing and written communications with the client to their supervisor for review and approval. They must discuss strategies of fact investigation, legal research and writing, client counseling, and court action before implementation. When a client asks the student questions about her case, the student will need to discuss with her supervisor the best advice to give the client,

⁴⁴ A recent study of faculty supervision of medical residents' practice established that the more years of experience the supervisor has in supervision, the better the supervisor's ability to predict residents' levels of competence in patient care. See Christine Taylor & Martin Lipsky, *A Study of the Ability of Physician Faculty Members to Predict Resident Performance*, 22 FAM. MED. 296 (1990).

⁴⁵ This interest is recognized in Model Rule 1.3 which states that "[A] lawyer shall act with reasonable diligence and promptness in representing a client." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (1993).

then call or write the client with the answer. This can take days.

Third, exam periods, school vacation breaks, course responsibilities, jobs and summer breaks intervene with, and slow, student work. Fourth, actual court and administrative hearings tend to take longer with student attorneys than if the supervising attorney acted on her own. Students, trying to compensate for inexperience, tend to use as many theories and pieces of evidence as they have. During trials, students may stop a direct or cross-examination to collect their thoughts or to consult with their supervisor. Occasionally, judge or adverse party hostility will cause a delay.

Finally, much of the educational value in the clinic comes from *reflection* on the choices made during representation, and this process takes time. This reflection, while essential to learning and often valuable to the student representation,⁴⁶ further delays action. If they do their work well, however, law school clinics trade clients' interest in attorney speed for reflective, thorough and well-prepared student representation.

C. THE CLIENT'S INTEREST IN CONTINUITY OF CARE

Many legal matters take months or years to resolve. Even when the client has some control over the timing of events, such as when forming a partnership or writing a will, other events may prevent resolution of the matter within a semester or two. As a result, clients may have several student attorneys over the course of their representation. This creates unique problems for both clients and students and deserves some attention.⁴⁷

When one student leaves the clinic, because her clinical course has finished for example, the client may be assigned a new student attorney. The client must establish a new relationship and perhaps explain the cause and the client's particular situation all over again to another novice attorney. In addition, the new student attorney may bring a fresh set of ideas to the case and attempt to reshape the plan of action. The client must be flexible and patient. Furthermore, changes in student

⁴⁶ Cf. Bellow, *supra* note 10, at 386-94 (discussing requirement that good clinicians balance performance with self-consciousness).

⁴⁷ Cahn and Schneider discuss methods for facilitating the transition between successive student attorneys. See Naomi Cahn & Norman Schneider, *The Next Best Thing: Transferred Clients in a Legal Clinic*, 36 CATHOLIC U. L. REV. 367 (1987).

attorneys may lead the client to look to the supervisor as primary attorney, even though the supervisor does not consider that as the supervisor's role. In fact, to do so would defeat some of the educational goals of the course.

Clients who engage the services of a law school clinic may unknowingly relinquish their interest in a continuing relationship with a primary attorney. While continuity of supervision helps to blunt the ill effects of changes in student attorneys, many clinics still rely on temporary supervisors, visitors and grant-funded attorneys. Law schools and their overseers — the American Association of Law Schools and the American Bar Association — typically have not worried about the adverse effects on the client population when deciding how to staff and fund clinics.⁴⁸

D. THE CLIENT'S INTEREST IN PRIVACY AND CONFIDENTIALITY

In order to carry out clinic and client goals, many people often discuss a clients' case. Discussion of issues presented in clinic cases provides a great deal of students' education. That discussion takes place during individual supervision, in the classroom, and sometimes in the larger law school or university community. The discussion of clients' cases within the law school clinic are analogous to discussions within law firms and do not breach the lawyer's duty of confidentiality.⁴⁹

⁴⁸ None of the accreditation requirements for law school clinics deal explicitly with protection of clients. Rather, the standards focus on protecting student education and on equitable treatment for clinic teachers. See A.B.A. STANDARDS, *supra* note 4, §§ 301-06 (focusing on academic requirements needed to protect students' education) and standard 405e (describing the conditions necessary to "attract and retain a competent faculty"). On the other hand, the 1980 A.B.A. Committee on Guidelines for Clinical Legal Education required that "sufficient human and financial resources [be] allocated to the clinical legal studies courses to . . . meet professional responsibility requirements." GUIDELINES, *supra* note 3, at 17. The Guidelines also mandated that, "[T]he client's interests require that the client . . . consents, knowingly, to being represented by a student, . . . [and] has ready access to the student's professor, supervising attorney, or cooperating attorney supervising the student." *Id.* at 25-26. These provisions, however, pale in comparison to the detail with which the Guidelines address educational objectives.

⁴⁹ See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1993) ("Lawyers in a firm may . . . disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.").

A deeper privacy interest is often at stake, especially since conversations move beyond the typical law firm or legal services case discussion. Clinic deliberation often includes subjects such as the larger implications of poverty, race, battering, due process and the dysfunction of the legal system for many people. These discussions lead students toward a greater understanding of the legal system and to contemplate their own role in instigating social change. Recent clinical scholarship also exhorts us to use our clinical experiences and clients to study the legal system and to share what we learn about it.⁵⁰

In my experience, clients are rarely present during the class sessions when these discussions are held. What do they think about clinicians and students using their pain and travail as an exhibit for student education? I suspect many would have no objection, so long as it aided the advancement of their interests; others would feel used. I contemplate how I would feel if my medical care were conditioned upon my consent to my case being used as a subject for doctors discussing the effects of sedentary work lives on the emotional health of white mothers. I am certain that the purpose for which my story was used would make a difference.

Client interests in confidentiality are also compromised when students and clinical teachers discuss cases in the lunchroom, the law library, the bathroom between classes or the offices of other professors.⁵¹ Although the larger law school, or university community, is *not* a law firm where virtually every person on the premises is alert to the business at hand and the need to protect client confidences, students and clinical teachers can easily think of it as such. It is their workplace and they are accustomed to talking about their work there.⁵²

⁵⁰ See, e.g., Alfieri, *supra* note 3; Cunningham, *supra* note 13 at 2494; Goldfarb, *supra* note 3 at 1605-06; *Foreward to Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. xviii (1992) ("[R]ecently a number of scholar-practitioners have begun to turn their attention to the lived realities of societally disempowered people and the interactions between those persons and the lawyers working with them . . .").

⁵¹ See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1993) ("[T]he lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to . . . make other arrangements minimizing the risk of disclosure.").

⁵² Careless disclosure of client confidences may be more common in clinical programs that are not physically separated from the rest of their schools. Yet, isolation from the rest of the law school is a condition some clinicians have

Almost all clinic supervisors instruct their students and immediate staff to keep the confidences of the client secret.⁵³ At the same time, members of the larger law school community may not be aware of the lawyer's duty of confidentiality. Do the audio-visual technicians know that videotapes of client interviews contain confidential communications? Do the bookkeepers and auditors in the law school know that client trust fund accounts are confidential? Might a member of the development office in the course of grant-writing assume they are entitled to a list of clinic cases and client names? And are the non-clinical professors and clinic students reminded that student questions about legal issues in real cases should be couched in hypothetical terms?

Finally, supervisors usually keep files on each of their students in order to evaluate their individual performance. Their files might contain notes of supervisory meetings or early drafts of documents later finalized. These files often make reference to client confidences, which were part of case strategy discussions. Clinic programs should ensure the continuing security of these files.

E. THE CLIENT'S INTEREST IN BEING UNDERSTOOD

The client's interest that an attorney understand the client's situation is different from the client's interest that "mistakes" be avoided in the course of the representation. The client's interest in being understood includes the desire for a connection with her attorney, for dignified treatment, and a comprehension of her situation.⁵⁴ A person who has some understanding of

been seeking to eliminate. Clinics need some integration with their larger school communities if they are to share in the law schools' resources, if clinic teachers and staff are not to be treated as second class citizens, and if they are to be understood as an important part of students' education. Yet, as clinics become integrated with the larger school community, greater caution with their clients' secrets will be needed.

⁵³ See, e.g., MINNESOTA RULES OF PROFESSIONAL CONDUCT 1(c) (1993) ("[A] lawyer shall exercise reasonable care to prevent employees, associates and others whose services the lawyer utilizes from disclosing or using confidences or secrets of a client . . ."); see also ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993).

⁵⁴ See Tom Tyler, *Client Perceptions of Litigation — What Counts: Process or Result?*, TRIAL, July 1988, at 40 [hereinafter *Client Perceptions of Litiga-*

the type of problem or task that the client is currently facing best serves the client's interest.

Most law school clinics practice with the poor.⁵⁵ Law students are far less likely than their clients to have personal experience with extreme poverty, illiteracy, hunger, homelessness, mental illness, the dehumanization of minimum wage jobs or the welfare office.⁵⁶ While this may also be true of legal aid attorneys and public defenders, these advocates for poor clients have gained an understanding of the conditions of their clients' lives through experience. An experienced poverty lawyer is less likely than a student to assume that a client owns a dress for court, can read the offending lease clause out loud during direct examination, or has bus fare for a helpful errand at the end of the month. As a result, clinics should teach students the limits of their own perspectives,⁵⁷ the importance of openness, and the ability to suspend conclusions while listening to the client's story.

Clients' stories of disenfranchisement sensitize students to the limitations of our legal system and society and to the need

tion]; Tom Tyler, *What is Procedural Justice? Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988); William O'Barr & John Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137, 159 (1988); Tom Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 199, 203-04 (1990) (discussing the psychological effects of settlement and questioning whether clients only need money to feel as if they have "won" a case).

⁵⁵ Even where rules do not restrict student practice, clinic administrators often perceive that clinics must avoid competition with the practicing bar upon whose goodwill and contributions their law schools may depend. Thus, clinics generally focus their practice on the poor even where such restriction is not part of the student practice rules.

⁵⁶ One can reasonably infer this from the fact that the average cost of one year at a public or private law school in this country was \$9,645 in 1991, and that one must first pay for four years of undergraduate education before attending law school. See Sally Goldfarb & Edward Adams, *INSIDE THE LAW SCHOOLS* (1991) (listing the tuitions for 112 private and public law schools).

⁵⁷ See MINOW, *supra* note 24, at 373-90 (1991) (describing the assumptions about differences that are embedded in our society and legal institutions, and arguing that understanding our own assumptions about difference, i.e. our own perspectives, is crucial to the execution of justice in our society); Peter Margulies, *Who Are You to Tell Me That: Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 245 (1990) (on importance to client representation of student attorneys learning to understand their own perspectives); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

for lawyers to address those limitations.⁵⁸ Law school clinics are valuable, in part, because they allow students to grapple with "real life" problems of justice. When a client faces a student who is trying to understand a foreign experience for the first time, the explanations are more wearing. Thus, a client may find it more difficult to explain the loss of one's job, homelessness, hunger, fear of the landlord, or the pain of lack of opportunity to a student lawyer. This is a price clinic clients pay for our involvement with their lives.⁵⁹ Clients "pay" for their legal representation with their time, pieces of their dignity and their openness to sometimes ignorant strangers. Clinics and law schools have not done well at acknowledging that price.

F. THE CLIENT'S INTEREST IN PARTICIPATION

The client's sense of whether justice has been served depends in part on whether the client was heard and allowed to participate in the process.⁶⁰ Gaining client participation in legal matters is a skill.⁶¹ Experienced attorneys, when sensi-

⁵⁸ The University of Maryland's Cardin program and the City University of New York Law School at Queens, among others, explicitly articulate that one of the purposes their clinic program serves is to encourage students to engage in social justice work or pro bono work during their legal careers. See Barbara Bezdek, *Legal Theory and Practice Development at the Univ. of Md.: One Teacher's Experience in Programmatic Context*, 42 J. URB. & CONTEMP. L. 127, 129-30 (1992); Freamon, *supra* note 3, at 1238, 1242, 1245 (Seton Hall and North Carolina programs have goal to encourage an ideal of lawyer community service in their students).

⁵⁹ On the other hand, relaying her life story to an attentive student and supervisor may be a great relief to a client, especially when no one who is part of the bureaucracy has listened to her before. From the student's perspective, a client's tale may illuminate for the first time the stark and unfamiliar realities of poverty.

⁶⁰ Cf. Tyler, *Client Perceptions of Litigation*, *supra* note 54; O'Barr & Conley, *supra* note 54; *Characteristics of Legal Malpractice*, 1989 A.B.A. REP. STANDING COMMITTEE ON LAWYERS' PROF. LIABILITY; *California Lawyers Must Take Refresher Courses*, N.Y. TIMES, Aug. 9, 1991 at B7 (discussing lawyers' perception that "they do not need much contact with their client to accomplish the job . . .").

⁶¹ Numerous scholars, especially feminist theorists, have discussed the challenge of obtaining client participation as opposed to discouraging it. See, e.g., Goldfarb, *supra* note 3, at 1604; Alfieri, *supra* note 3; Cahn, *supra* note 12, at 19; Kathryn Abrams, *Feminist Lawyering and Legal Method*, 17 LAW & SOC. INQUIRY, 373, 396-400 (1991); see also Robert S. Redmount, *Paternalism and the Attorney-Client Relationship*, 14 J. LEGAL PROF. 127 (1989).

tive to this concern, have developed strategies for gaining client involvement.⁶²

Most law students have some image of an attorney-client relationship. Students strive to master their new roles as counselors. They believe they are supposed to do as much as they can for the client and seek to gain credibility with the client by taking complete control of case development and preparation. As a result, they sometimes fail to recognize the value in client participation. The case study method of law school classes does not emphasize the client's role in the legal process. Thus, student interest in gaining mastery in the role of an attorney, combined with other law school training that de-emphasizes the role of the client, may overshadow the need for clients to participate in solving their own legal problems.

IV. VALUING CLIENT INTERESTS IN THE LAW SCHOOL CLINIC

Clinical programs can do more to mitigate the compromises forced on clients seeking representation from law school clinics. Each compromise and tension discussed above demonstrates the need for further teaching, administrative and advocacy strategies. The Model Rules of Professional Conduct, most student practice rules, the *A.B.A.'s Standards for Approval of Law Schools*, the *1980 Guidelines*,⁶³ and the courts offer little guidance to clinical teachers and their schools. None of these rules, guidelines or institutions have emphasized the protection of client interests in clinical settings.

The Model Rules of Professional Conduct do hold lawyers responsible for the conduct of their lawyer and non-lawyer assistants.⁶⁴ Although the Model Rules are a likely guide to what is allowed for student-attorneys, law student practitioners are hybrids of lawyer and non-lawyer; they are able to "perform all functions that an attorney can perform"⁶⁵ under most stu-

⁶² See, e.g., Alfieri, *supra* note 3, at 2110-13 (listing strategies for gaining client involvement in a poverty law practice, such as reversing roles — letting the client ask questions for part of the interview); White, *supra* note 3, at 535; Robert Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 687, 719 (1992).

⁶³ See generally GUIDELINES, *supra* note 3.

⁶⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.2, 5.3 (1993).

⁶⁵ See MINN. STUDENT PRAC. R. 1.01, 2.01 (1993).

dent practice rules, but are *not* bound by any professional conduct rules. A conservative construction of the Model Rules of Professional Conduct would put student attorneys under Rule 5.3 governing *non-lawyer* assistants. Rule 5.3 has been interpreted to require that a supervisor of *non-lawyers* "maintain a direct relationship with his client, supervise the delegated work and have complete professional responsibility for the work product"⁶⁶ and "take account of the fact that they [non-lawyer assistants] . . . are not subject to professional discipline."⁶⁷ These rules demand a balance between supervision and granting students a meaningful learning experience.

To compensate for the lack of guidance provided by the above rules, clinics need to develop their own programs to insure that this tenuous balance between supervision and student autonomy is maintained. What follows is a brief outline of seven steps clinics can take (and in many cases do) to mitigate the compromises their clients make in securing legal representation from a law school clinic. These are not intended to lead to ironclad rules and accreditation requirements. The teaching community needs to reach a better consensus about how client concerns fit into law school clinics and the rest of the law school curriculum. That consensus may lead to a new emphasis on clients in classroom teaching, student practice/client oversight committees, and new sets of guidelines for clinical programs.

A. SUPERVISORS SHOULD FOCUS MORE ATTENTION ON CLIENTS BY ATTENDING INITIAL CLIENT MEETINGS

Few clinical supervisors attend initial interviews with clients. Most leave these interviews to the student-attorneys, either alone or as part of a team. Supervisors justify their absence with the fear that students will be overly self-conscious

⁶⁶ State v. Barrett, 483 P.2d 1106, 1111 (Kan. 1971); *see also*, State v. Caenen, 681 P.2d 639, 642 (Kan. 1984); State of Okla. Bar Assoc. v. Braswell, 663 P.2d 1228 (Okla. 1983) (attorney could not shift blame to negligent law clerk who filed case in "dead" file cabinet for a client case that was lost for failure to meet statute of limitations); Crane v. State Bar of Calif., 635 P.2d 163 (Cal. 1981); *In re Schelly*, 446 N.E.2d 236 (Ill. 1983) (attorney accountable for assisting law clerk in unauthorized practice of law when he sent the clerk to court alone to seek continuances — the student tried one case and argued a motion in the other); *In re Neimark*, 214 N.Y.S.2d 12 (2d Dep't 1961).

⁶⁷ *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 cmt. (1993).

if they are present during the interview or that the client will look to the supervisor as his primary attorney.

The reality, however, is that supervisors believe they do not have the *time* to attend initial client interviews. The supervisor prefers to remain available for questions in the supervisor's office (or the prison or hospital or legal aid office) while the interview is conducted, and perhaps follow the interview with a discussion or by viewing a videotape of the interview. This practice assumes that at an interview any student errors will be detected by the supervisor and fixed at a later date.

The clinic should minimize mistakes by paying closer attention to the early interviews with the client. The most effective and efficient way to give that attention is for supervisors to attend those early interviews. The supervisor could sit in the background, allow the student to introduce the supervisor to the client, keep quiet until the student is finished with questions, respond to a planned student query of whether the supervisor has questions by asking any important remaining questions, and then turn the close of the interview back to the student. Alternatively, at the end of the student's questions, student and supervisor may leave the interview room for a few minutes to copy client papers, at which time the supervisor can highlight areas that need coverage, and on return, the student can ask the important remaining questions.

Clients gain the following advantages through supervisor attendance at interviews that are difficult to ensure in other ways.

1. *Evaluation of a Client's Context and Goals*

Most law students have not developed the ability to perceive and unravel all of the important facts in a client's story.⁶⁸ Training students in this skill is not simple. Reading, talking about issues in the classrooms, and practicing with each other and with actors can help prepare students to explore the hidden sides of a client's case.⁶⁹ Simulation exercises can give a stu-

⁶⁸ For a discussion of how legal education's generic view of people and experience persuades law students that they can solve problems with little input from clients and their communities, see Gerald Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

⁶⁹ The importance of client factual context is widely accepted among clinical educators. See, e.g., Dinerstein, *supra* note 62 (discussing the wide-

dent practice in seeing that context is relevant to the client's case and shapes the client's goals. Simulated interviews may also accustom students to ask difficult or personal questions.

By their nature, however, simulations have a finite number of facts and a finite depth to their educational value. Simulations cannot duplicate the complex emotions a student and client may experience in an interview when, for example, a student believes the client is lying or the client weeps or expresses moral outrage at the legal system. In such situations, students may experience confusion, anger, feelings of inadequacy, shame, moral tension or fear. The student's confusion may lead the student to erase the difficult interview moment from his or her mind. At other times, a student may make incorrect conclusions about a client because a student does not recognize the signs of mental illness, chemical dependence or depression, or know how to translate across gender, religious, age or cultural differences.

When a supervisor is present for an interview, the supervisor can show the student the supervisor's personal judgments about whether to develop facts in seemingly peripheral areas, prevent the wrong conclusions that the student draws from "different" behavior, and suggest or show how to probe difficult areas while keeping the client's trust.⁷⁰ Crucial facts and an accurate sense of the client's beginning goals will thereby be available from the outset of the representation, where they can have appropriate influence on case strategy.

2. *Development of a Client's Voice*

Recent scholarship has admonished lawyers to resist imposing their own structure on client narratives at the interview.⁷¹ A related strand of scholarship argues that lawyers must keep categories tentative, contingent and related to real people's lives

spread acceptance of the importance of factual contexts among clinical educators and critiquing clinical textbooks for failing to reflect importance); see also Goldfarb, *supra* note 3, at 1599; Cahn, *supra* note 12, at 17.

⁷⁰ See DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 21, 22, 40-44, 76, 240, 245, 260, 266, 272 (1991); ROBERT BASTRESS & JOSEPH HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 145-193 (1990).

⁷¹ See, e.g., Alfieri, *supra* note 3, at 2107; Dinerstein, *supra* note 62, at 723; Cahn, *supra* note 12, at 15-18.

if their representation is to be effective.⁷² If the lawyer successfully listens to the client's own voice, the lawyer will construct legal analyses and practical strategies that best convey the client's understandings and goals. The source of the most effective legal strategy is often the client.

Legal educators are still figuring out *how* to teach students this skill. Students begin learning to listen to client interpretations through reading, class discussion and simulation exercises. For most lawyers, suspending personal pre-understandings to hear the subtext as well as the text of client stories takes practice. Remaining open to a client's sometimes startling interpretations of facts, especially when they differ greatly from our own, can be a strain. In fact, becoming comfortable with silences and less control in the interview is as difficult for teachers as for students. Educators are just beginning to create exercises that train students to see how their perspectives on the world color the information that they elicit from clients.⁷³

Teaching students to listen for client-generated categories and homespun analyses of legal situations is a beginning. Once a student has listened to the client's version of the situation and probed the client's own sense of the justice or injustice in the matter, the student must learn to choose or bend the legal categories to fit the client's understandings. Law teachers must become better at articulating this process to be more effective teachers. Until then, the clinical teacher's presence at early client interviews makes successfully eliciting client analysis in individual cases more likely.

Even when a client's own interpretation does not yield the most effective legal theory, early inquiry into it affirms the client's voice from the onset of the lawyer-client relationship. A client who knows that *the client's* understanding of the situation matters is more satisfied with the client's individual experience with the justice system.⁷⁴ More importantly, clients are em-

⁷² See, e.g., Harris, *supra* note 57, at 612; see also Cunningham, *supra* note 13.

⁷³ Students who are "different" from the dominant culture often have a greater awareness of this than those who have not stood out, because for survival they have had to understand the dominant culture as well as their own. See Harris, *supra* note 57.

⁷⁴ Again, clients care more that they understand what is going on and are included than that a certain dollar amount be awarded. See *supra* part III.F.

powered outside of the lawyer's office and the courthouse when their own voices have been heard.⁷⁵

Finally, learning not to impose our own pre-understandings on the client's narrative includes not imposing a litigation structure over the client's matter. While it is true that many clinic clients arrive after they are already in the court system, clinic lawyers must not assume that engagement with the legal system is best for the person or the person's community.⁷⁶

3. *Courtesy to Clients and Client Assurance*

Supervisor attendance at early client interviews is courteous and a simple way to boost client satisfaction. First, supervisor attendance at an early meeting allows the client to have more of her legal questions answered right away. Law students generally may not give legal advice to clients unless that advice has been approved by their supervisor.⁷⁷ When the student alone interviews, the student must defer answering unanticipated client questions until the student can consult with the supervisor. This process can take days.

Second, the supervisor has ultimate professional responsibility for the case.⁷⁸ If the supervisor attends an initial interview, the client can meet and judge the people who will be making decisions about the case and discussing the intimate details of the client's life.⁷⁹ The supervisor can more easily

⁷⁵ See Freamon, *supra* note 3, at 1236 (describing the goal of client empowerment in legal practice: "the client begins to listen to her own voice, rather than the lawyer's voice, and truly begins to approach her destiny as someone other than a victim"); see also, Lopez, *supra* note 7.

⁷⁶ See Lopez, *supra* note 68, at 343-358 and *supra* note 7 (arguing that litigation sometimes serves the lawyers better than the clients and that we ought to take our clients' communities into account when planning strategies with them).

⁷⁷ Student practice rules generally allow students to perform all functions of attorneys, but the supervisors are legally and ethically responsible for all of the student actions. See, e.g., MINN. R.S. CT. 2.01, 2.04. Practically speaking, a responsible supervisor will require that students clear any legal advice with the supervisor before advising a client.

⁷⁸ See *supra* notes 63-67, reviewing the student practice requirements of supervisor professional responsibility for the client and the courts' interpretation of MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3, requiring a direct relationship with the client when supervising nonlawyers.

⁷⁹ A recent study of medical resident education found that patient satisfaction was much higher among those who met the physician supervisor and to

assuage client unease with student inexperience or the educational aspect at the initial interview.

4. *Respect and Concern for Clients*

Students will detect whether a supervisor has a high regard for clients. A first indication is whether the supervisor is too busy for direct contact with clients. To send the message that clients are important, clinical supervisors must take the time to meet and listen to clients.⁸⁰ Furthermore, students also learn how to treat clients respectfully by watching experienced supervisors interact with clients.⁸¹ Not surprisingly, respectful attitudes shown by teachers toward clients translate into respectful student attitudes. Legal educators may some day refine methods of teaching students to discover the client's circumstances and goals without ever attending client interviews. No substitute exists, however, for attending client interviews if a teacher wants to show law students that clients are the source of meaning in most lawyers' work.

5. *Enhancement of Student Learning*

Finally, supervisor presence at interviews allows students to learn more from these interviews. Supervisors may critique the students' work and draw attention to issues the students may have missed. Self-evaluation is one of the most important skills that can be taught in law school clinics.⁸² Developing

whom the educational program was explained. T.M. Gerace & J.F. Sangster, *Factors Determining Patients' Satisfaction In a Family Practice Residency Teaching Center*, 62 J. MED. EDUC. 485 (1987).

⁸⁰ See Lopez, *supra* note 68, at 354 (describing how much of legal education regularly teaches students to "ignore those with whom they work").

⁸¹ Medical students learned more about how to behave with patients by patterning themselves on the observed behavior of skilled doctors, or "modeling," than by early practice experiences of their own. See David Irby, *Clinical Teaching and the Clinical Teacher*, in CLINICAL EDUCATION OF MEDICAL STUDENTS 39-40 (1987); see also Kotkin, *supra* note 10, at 184 (arguing that law clinic teachers should be more flexible in their teaching approaches and should model more often for their students' benefit).

⁸² See Nina Tarr, *The Skill of Self-Evaluation as an Explicit Goal of Clinical Teaching*, 21 PAC. L.J. 967 (1990) (on teaching the skill of self-evaluation in the clinic); MACCRATE COMMISSION REPORT, *supra* note 25, at 218-219 and § 4.1 (identifying Professional Self-Development as one of four "Fundamental Values of the Profession" and describing the importance to

this skill in the interview setting without the help of an experienced teacher is difficult.

Many students are markedly unaware of their interviewing weaknesses. For example, students' evaluations of their interviews are more likely to focus on a perceived "failure to control" a client's rambling, rather than on their failure to reassure a client so that the client continued to relate pertinent information. Students also will evaluate their client as untruthful or uncooperative when an experienced eye would see instead a confused or frightened client. Making such distinctions, even upon viewing a videotape of the interview, where such things as sweat, shaking hands, and small eye movements may not be visible, is difficult.

Clients are important teachers in clinical education. With supervisors' eyes and ears as guides, students may learn more from them. If client lessons about the legal system, trust, deception, respect and dignity are to be learned, supervisors should attend interviews.

B. SUPERVISORS SHOULD ENSURE THOROUGH EXPLANATION OF THE CLINICAL PROGRAM TO CLIENTS AND CLIENT CONSENT TO STUDENT REPRESENTATION AND USE OF CASE STORIES

Students and clinical supervisors should fully inform clients when a student will be the primary representative in their cases and obtain their consent to that representation in writing.⁸³ Yet, most student practice rules *do not* spell out any requirement of informed consent from the client; rather, they require court, law school or attorney consent.

Law school clinics often do not rigorously obtain informed consent from their clients.⁸⁴ Disclosure should include more

lawyers of the process of critical reflection upon and learning from experience).

⁸³ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1993) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ."); see also Lee Hwang, *The Ethical Obligations of a Teaching Lawyer*, 38 CONTINUING LEGAL EDUC. J. & REG. 5 (1992) (concluding that when teaching other members of the bar, lawyers' duties of loyalty and confidentiality to their clients make it best to obtain clients' informed consent before using the client's story in teaching, even when the story is used anonymously).

⁸⁴ See, e.g., Daniel Cohen et al., *Informed Consent Policies Governing Medical Students' Interactions with Patients*, 62 J. MED. EDUC. 789 (1987) (finding that only 37.5% of teaching hospitals informed patients that medical

than that a student will be handling the client's cause under the supervision of a member of the Bar. Rather, the information disclosed should include oral and written disclosures of the clinic's educational program. These materials should mention the benefits for everyone involved.⁸⁵ The disclosures should also inform or remind the client that a student attorney may take more time on the case than would a licensed attorney; the student and/or supervisor may change if the representation lasts more than a certain amount of time; other people in the clinic class will hear about the client's case; and sometimes the client story will be used for educational benefit, even after the clinic is finished representing him. Clients should then be asked whether they have any questions or concerns about student practice and whether they consent to the clinic's use of their cases for education. As mentioned above, some of the clients' concerns may be more easily addressed if the supervisor is present during the disclosures.

Law schools assume that student practice is not the same as experimentation with human subjects, but several principles from research on humans still apply. First, when clinic clients are used for social science research into practice, instead of as a vehicle for teaching practice, clinics should have even stricter standards for disclosure and consent,⁸⁶ as well as an outside oversight committee.

Second, clients should benefit from their participation in the law school clinic, and clinicians and students should be obligated to give back to the communities from which they draw their clients.⁸⁷ Law schools should consider whether they return to their client communities at least as many benefits as the schools receive. Free legal representation may not be sufficient compen-

students would be involved in care).

⁸⁵ See discussion of client interests served by clinics, *supra* part II; see also, Hwang, *supra* note 83.

⁸⁶ Detailing what those stricter standards should be is likely to be controversial. See, e.g., Raanan Gillon, *Medical Treatment, Medical Research and Informed Consent*, 15 J. MED. ETHICS 3 (1989); William Silverman, *The Myth of Informed Consent: In Daily Practice and in Clinical Trials*, 15 J. MED. ETHICS 6 (1989) (outlining the continuing debate over the differences in the consent needed for ordinary medical treatment and that needed for participation in medical research).

⁸⁷ See ROBERT LEVINE, *ETHICS AND REGULATION OF CLINICAL RESEARCH*, 61-64 (1986) (describing evolution of the ethic that the research subjects be given the first fruits of the research).

sation for clients. For instance, law schools could offer the use of meeting rooms or recreational or day-care facilities, community education or high school classes on legal subjects, student help in neighborhood clean-up campaigns, or sponsorship of discussion programs oriented to matters of concern to the client communities.

C. SUPERVISORS AND STUDENTS SHOULD SHARE POWER WITH CLIENTS

Client participation in representation leads to better outcomes, or at least to better perceived outcomes, for clients. Respect for the client and the lawyer's willingness to share power are more likely to result in client participation.⁸⁸ Still, gaining clients' participation in their representation is an area where more research is needed. Every stage of legal representation requires strategies for inviting client involvement. At the initial interview, clinic lawyers should uncover the client's view of the facts and the meaning of those facts. The process of obtaining consent for the student representation acknowledges the client's participation in legal education and can be used to enable client participation in the advocacy process as well. Clients can perform many fact investigation tasks, and usually should be asked to perform them. For example, the client can gather public documents, obtain copies of private documents such as a personnel file, interview friendly witnesses, pick up a subpoena, and/or develop evidence. On the other hand, student-attorneys should be taught that the Federal Rules of Civil Procedure neither allow nor encourage much client participation in pre-trial processes.⁸⁹ Thus, students must plan ahead for client participation in settlement discussions in the judge's chambers or in motion hearings, for example.

⁸⁸ See, e.g., Cahn, *supra* note 12; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1989 BERKELEY WOMEN'S L.J. 39; Dinerstein, *supra* note 8; Ruth Colker, *The Practice/Theory Dilemma: Personal Reflections on the Louisiana Abortion Case*, 43 HASTINGS L.J. 1195. Both Dinerstein and Colker give real examples of attempts to put client participation ideas into practice, and discuss the practical difficulties of doing so.

⁸⁹ See, e.g., FED. R. CIV. P. 16 (where no role at all for the client is envisioned even though the course of the case will be determined by that particular rule's process).

Finally, clinics should invite clients to participate in clinic discussions as a method of gaining client participation. Classes could invite real clients to attend the educational exchanges about their cases or discussions of the issues raised in this article.

D. SUPERVISORS AND STUDENTS SHOULD USE LANGUAGE THAT CONNECTS WITH CLIENTS

Most people would probably agree that lawyers need to communicate more clearly with others. Unfortunately, overhauling communications with clients is not as simple as eliminating excess wording, such as "whereas," "hereinafter" or "null and void" from legal vocabularies. Changes in language are necessary to implement the goals of gaining client participation, enhancing dignity, and establishing connections with the clients.⁹⁰ Much legal language achieves technical ends or shows power, authority, professional detachment and status.⁹¹ Whatever its intent, language filled with legalisms or used to assert authority has a distancing effect on clients.

Attorneys must cultivate clarity. Achieving clarity means, for example, explaining the meaning of "party" or "answer" so that the client comprehends the legal use of those words. In addition, students and supervisors tend to forget that not all clients read well or use English as their first language.

⁹⁰ Critiques of traditional lawyering have described "connection" with the client as a feminist value and as a lawyering method to be developed. See Naomi Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992); Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992); see also Binder et al., *supra* note 70; DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELLING* (1977) (basic law school texts describing "client-centered" lawyering techniques — as distinguished from the traditional "lawyer-centered" techniques — and emphasizing the use of empathy or active listening); Stephen Ellman, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992) (arguing that lawyers ought to use approval in place of empathy at times, as it is a more effective "binding force" with their clients).

⁹¹ See Redmont, *supra* note 61, at 134; Austin Sarat & William Felstiner, *Lawyers and Legal Consciousness: Law Talk in Divorce Lawyers' Offices*, 98 YALE L.J. 1663 (1989) (analyzing conversations between divorce lawyers and their clients, explaining how "law in action" is created in such settings, and concluding that lawyer/client interactions are deeply conflicted and socially unequal).

Moreover, lawyers need to achieve a balance between words that accomplish ends in the case and words that cultivate connection with the client. Evidence in the medical context shows that client satisfaction is better served by communication that enhances connection rather than by communication that exerts control.⁹² One study found that patient satisfaction with medical care was based largely on communication style between physician and patient. An affiliative style — "designed to . . . communicate interest, friendliness, empathy, warmth, genuineness, candor, honesty, compassion, desire to help, devotion, sympathy, authenticity, a nonjudgmental attitude, and humor" — resulted in far more patient satisfaction with care than did a command and control style — characterized by dominance, more time spent speaking, but less time overall spent with the patient, quickness to challenge, and lack of expressiveness about the physician's own reactions or feelings.

The lesson is to communicate, in part, for the purpose of establishing a relationship — to communicate to the client as a person rather than as a case.⁹³ When discussing the client's goals, instead of speaking only in terms of dollar amounts or actions desired, one might try adding words of emotion and relatedness.

Even students who have naturally affiliative styles often need to learn to put simple friendliness into their lawyerly communications with clients. When students write to clients, they tend to strip all emotion out of those letters and only convey information. Compare a client letter that includes key information but closes with "We are very sorry that we were unable to help you win unemployment benefits, but hope that you will soon find new work with a more humane employer," with a letter where the ending is "Your time to appeal the unfavorable decision expires on (date). Your file will be closed in this office now."

Finally, law schools should thank clinic clients for allowing them to use their lives and legal problems as lessons. Clients often express gratitude to their student attorneys. Every student should be taught to express the same gratitude to their clients.

⁹² See Mary K. Buller & David Buller, *Physicians' Communication Style and Patient Satisfaction*, 28 J. HEALTH & SOC. BEHAV. 375 (1987).

⁹³ *Id.* at 380.

E. SUPERVISORS SHOULD INTERVENE WHEN NECESSARY TO PROTECT CLIENTS FROM STUDENT ERRORS

Clinical teachers should hold back and intervene only when a student performance error threatens the interests of the client. Otherwise, the teacher compromises the student's education. Decisions to intervene are difficult.⁹⁴ When judging whether to intervene in a student's performance, a teacher at a minimum must be well informed about both the client's cause and the student's limits and competencies.

As Professor Critchlow discusses, professional responsibility sometimes dictates that a supervisor intervene, even when it means impairing the student's learning experience, if the student's mistake will harm the client.⁹⁵ The student should watch while the teacher takes over and protects the client's interest. Intense concern for the client's cause is a value that teachers are seeking to inculcate in students, and restrained intervention demonstrates that concern. The possibility for harm to the student's interest in performing "solo" lies primarily with the untrained or inexperienced supervisor who intervenes prematurely out of fear of relinquishing control.

F. SUPERVISORS SHOULD ESTABLISH EFFECTIVE SYSTEMS TO PROTECT CLIENT CONFIDENTIALITY

One may assume that students in clinics are admonished about their professional responsibility to keep client confidences.⁹⁶ Clinical teachers must ensure that students comply with

⁹⁴ George Critchlow identifies five core values in clinical teaching that must be weighed when deciding whether to intervene in a student's performance:

1) Respect for the client's professional relationship with the student and expectations flowing from that relationship; 2) Respect for the client's right to make an informed decision about student representation and its advantages or disadvantages; 3) Concern for the client reflected by the clinical teacher's ability to adequately diagnose and predict student competencies; 4) Concern for the client reflected by the clinical teacher's personal readiness and competence to assume client representation responsibilities; and 5) Concern for adverse collateral consequences to the client and others which might be avoided through intervention.

Critchlow, *supra* note 28, at 437.

⁹⁵ See *id.* at 427-31.

⁹⁶ See, e.g., MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a)(1) ("[A]

these admonishments. The law school setting presents more opportunities for careless breach of client confidences than do most law firm settings, in part because law schools are filled with people to whom the requirement to keep client confidences does not extend. Clinics should distribute a written protocol regarding the expectations and challenges of keeping client confidences each semester.

Clinic teachers should periodically remind students, law professors and support staff to protect client confidentiality. For example, any clinic newsletter should note that client permission was obtained if client stories are recounted, and include a diplomatic reminder that other members of the law school community should not ask students or staff for details of their cases. Questions about cases to non-clinic professors should be couched in hypotheticals, absent express permission from the client. Law school clinics obviously must structure space and filing systems to ensure that client confidences are kept. The availability of private phoning rooms, meeting spaces, mail boxes and secure filing cabinets foster such protection. Finally, in order to minimize the subtly disrespectful effects of using client confidences in the classroom, class discussions should include examination of clients' strengths and wisdom, as well as of their troubles and pain.

G. SUPERVISORS SHOULD INSIST THAT JOB EVALUATIONS INCLUDE EVALUATION OF CLINICAL SUPERVISOR LAWYERING

Lawyering performed by clinical supervisors is in many ways inextricable from the clinician's teaching mission.⁹⁷ In addition to forming lawyer-client relationships, practicing law and protecting client interests, clinicians must also provide a model to the student.

lawyer shall not knowingly reveal a confidence or secret of a client . . .") and Rule 1.6(c) ("A lawyer shall exercise reasonable care to prevent employees, associates and others whose services the lawyer utilizes from disclosing or using confidences or secrets of a client . . ."); *see also* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993).

⁹⁷ *See* Kotkin, *supra* note 10, at 190 (arguing that clinical teachers should do more primary representation of clients so that students who learn best by observing — rather than by role assumption — will not be left behind, and also so that the teachers will not burn out from the tensions of the role).

Yet, clinicians' primary lawyering is often overlooked by the law school at large. Law schools reveal their attitudes toward client work in job evaluations for clinical teachers. Law faculties consider teaching, service, and scholarship, or scholarship "substitutes" such as appellate litigation, when evaluating clinicians for continuing appointments or tenure. Further, the American Bar Association and Association of American Law Schools do not ask law school inspection teams to look beyond the teaching program to evaluate the quality of the lawyering performed in clinical programs. This suggests that law school overseers assume that if the teaching is adequate, so is the lawyering.

While not detailing a system for evaluating clinical supervisors on their lawyering, this clinician would emphasize the need for some kind of evaluation of clinics as law offices, rather than only as instructional settings. In any evaluation, one of the first concerns is the ability of most law professors, who are not practicing, to evaluate the quality of a practitioner's work.⁹⁸ Given their history within the law schools, many clinicians also may legitimately fear that academics would only use evaluations of their lawyering as a means to further subordinate clinical faculty. Taking account of these concerns, law schools should evaluate clinicians both to ensure quality of care for clinic clients and to display the many aspects of clinicians' work to their employers.

Clients should also have an opportunity to evaluate clinic programs through written surveys or exit interviews. Rather than using objective criteria, such as amount of money recovered, other relief obtained, length of time the representation took, or costs of the results obtained, client satisfaction should be the measure of performance. Most clients do not measure their satisfaction with their lawyers in quantitative terms, but are more concerned with achieving "justice."⁹⁹ Client insights from well-designed evaluations of clinic practice are necessary to improve clinic lawyering.

⁹⁸ See *supra* note 22 (noting lack of practical experience among law professors).

⁹⁹ Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer-Client Interaction*, 22 LAW & SOC'Y REV. 737, 737-43 (1988).

CONCLUSION

Live-client clinics can lead the rest of their law schools in implementing the basic recommendation of this article: to recognize the importance of the client in advocacy and legal analysis. To achieve this end, clinicians must work with students to develop cooperation, listening and investigative skills. They must help students to understand their own perspectives, and teach them to inquire about their clients' positions rather than making assumptions about them. Clinicians should respect and teach legal analysis not as an end in itself, but as a skill in the service of people with continually evolving goals and circumstances. They must also learn to include clients in their representation and convey to clients that clinics need them, too.

On the whole, law schools have begun to realize that legal education would benefit from paying more attention to clients and their experiences. Further study of clients, justice, practice and teaching is clearly needed, and clinics are one place where that study can take place. While examining the clinic-client relationship and the legal system, one must take care that the magnifying glass of study not place a barrier between clinicians, students and the interests of the subjects of study, the clients. The challenge is to stay client-conscious in the course of research endeavors. Studies may have to be aborted and students' educational experiences stopped short when clients need to end their engagement with the legal system or with clinic representation.

Two final safeguards may be noted here. First, clinicians should remember that they will gain neither respectability nor worth in the academy by forgetting their roots in client service. For their part, law schools will not succeed in their hundred-year-old wish to be regarded as true members of the academy, by minimizing the worth of lawyers' work with clients.

Second, one of the best precautions against too much distance from clients' causes is for clinicians to work on projects that matter to the clinicians as people. When teachers are connected with client communities, intense concern for clients and their causes is easy to show, because the outcomes will affect them as people too. Caring about outcomes and being connected with client communities teaches students about the possibilities for joy and true meaning in the practice of law.